Supreme Court, U.S.
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No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC. *et al.*,
Respondents.

On petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE UNION RESPONDENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF THE UNION RESPONDENT IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Respondent Kentucky State District Council of Carpenters, AFL-CIO, supports the National Labor Relations Board's (NLRB) petition for a writ of certiorari.

A. A deep and pervasive split has developed among the circuits over whether the NLRB's approach to determining the supervisory status of nurses is correct.

The District of Columbia, First, Seventh, Eighth, and Ninth Circuits have sustained the Board's approach. *Beverly Enterprises-Massachusetts, Inc. v. NLRB*, 165 F.3d 960 (D.C. Cir. 1999); *VIP Health Services, Inc. v. NLRB*, 164 F.3d 644 (D.C. Cir. 1999); *Beverly Enterprises-Pennsylvania, Inc. v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997); *NLRB v. Hilliard Development Corp.*, 187 F.3d 133 (1st Cir. 1999); *NLRB v. Grancare*, 170 F.3d 662 (7th Cir. 1999) (en banc); *Beverly Enterprises, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998); *Providence Alaska Med. Ctr. v. NLRB*, 121 F.3d 548 (9th Cir. 1997). *But see Grancare*, 170 F.3d at 668 (Kanne, J., dissenting); *Providence*, 121 F.3d at 555 (Noonan, J., dissenting).

By contrast, the Second, Third, Fourth and Sixth Circuits have disagreed with the Board. *Schnurmacher Nursing Home v. NLRB*, 2000 WL 719507 (2d Cir. 2000); *Beverly Enterprises-Pennsylvania, Inc. v. NLRB*, 202 F.3d 253 (3d Cir. 1999); *Lakeview Subacute Care Center v. NLRB*, 178 F.3d 1279 (3d Cir. 1999); *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3d Cir. 1999); *Beverly Enterprises, West Virginia, Inc. v. NLRB*, 165 F.3d 307 (4th Cir. 1999) (en banc); *Beverly Enterprises, Virginia, Inc. v. NLRB*, 165 F.3d 290 (4th Cir. 1999) (en banc); *Mid-America Care Foundation v. NLRB*,

148 F.2d 638 (6th Cir. 1998); *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333 (4th Cir. 1998); *Grancare, Inc. v. NLRB*, 137 F.3d 372 (6th Cir. 1998); *Caremore, Inc. v. NLRB*, 129 F.3d 365 (6th Cir. 1997); *Manor West, Inc. v. NLRB*, 60 F.3d 1195 (6th Cir. 1995). *But see Attleboro*, 176 F.3d at 169 (Bright, J., dissenting); *Beverly Enterprises, Virginia*, 165 F.3d at 299 (Phillips, J., dissenting); *Grancare*, 137 F.3d at 377 (Moore, J., concurring in the judgment).

The fact that employers may petition for review of NLRB decisions wherever they transact business, 29 U.S.C. § 160(f), insures that the controversy over this issue will continue to consume agency and judicial resources unless it is resolved by this Court.

The importance of this issue, however, goes far beyond matters of judicial and administrative economy. As Judge Lynch recently observed:

> Whether mid-level care providers such as [a nursing home's] district and charge nurses are supervisors . . . is a significant legal issue that has divided the circuits. It is also an issue of some societal significance, affecting increasing numbers of people who will need nursing home care as the post World War II baby boomer generation ages. The issue is significant in part because labor costs in the health-care industry comprise a large portion of overall costs (estimated to be roughly 60% of hospital costs). The issue is important both to management, concerned with economic viability, and to employees, concerned about job security and workplace rights. [*Hilliard Development*, 187 F.3d at 137 (footnotes omitted).]

B. The division among the circuits in the nurse cases entails a fundamental disagreement concerning basic legal principles that threatens to spill over into cases arising in a wide variety of settings beyond the health care industry.

As the Board's petition for certiorari demonstrates, underlying the split in the Circuits over the specific question of the supervisory status of nurses are divisions among the Circuits on two legal issues of broad significance: (1) whether the Board's construction of the term "independent judgment" in the statutory definition of the term "supervisor" is consistent with the Act, *see Attleboro*, 176 F.3d at 163 ("split among the courts of appeals concerning whether the Board's interpretation of 'independent judgment' in LPN charge nurses cases is a reasonable construction of the NLRA"); *Beverly Enterprises, Virginia*, 165 F.3d at 298-99 ("To the extent that the [D.C., Eighth, and Ninth] circuits reach a different conclusion on the statutory meaning of independent judgment, however, we decline to follow their approach."); and (2) whether the Board's placement of the burden of proving supervisory status on the party alleging an employee is a supervisor is consistent with the Act, *see Grancare*, 137 F.3d at 379 (Moore, J., concurring).

Resolution of these important questions is critical to the enforcement of federal labor law.

1. The question of who is a supervisor arises in many representation cases, if for no other reason than the fact that the Board must draw a line between rank-and-file employees, who are eligible to vote, and their supervisors, who are not. The Circuits that reject the Board's conclusions regarding the supervisory status of nurses have departed from the rule of deference to agency construction of the ambiguous terms of a statute and thereby threaten the efficient administration of federal labor policy. *See NLRB v. Health Care & Retirement Corp.*, 511 U.S. 571, 579 (1994) ("phrases in § 2 (11) such as 'independent judgment' and 'responsibly to direct' are ambiguous, so the Board needs to be given ample room to apply them to different categories of employees").

By broadening the scope of review on the recurring issue of supervisory status, the approach of those Circuits that have

overruled the Board in the nurse cases fails to give effect to the principle that the Board's interpretations are "entitled to deference from the courts" if "rational and consistent" with the Act. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 796 (1990). Moreover, the impermissible broadening of the scope of judicial review impedes the expeditious resolution of disputes concerning representation and thereby defeats one of the central purposes of the Act.

2. The decisions of those Circuits that have overturned the Board on the nurse supervisor issue also threaten to drastically narrow the coverage of the Act contrary to the clear intent of Congress. Congress intended the Act to have broad coverage and its supervisory exclusion to be narrowly construed so that only those employees truly aligned with management are deprived of the protections of the Act. This is reflected in the statutory definition of "supervisor," 29 U.S.C. § 152(11), which distinguishes employees who exercise some authority over other employees from those who exercise "independent judgment" in doing so. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974); *see also Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996). Despite this clear indication of Congressional intent, the approach of those circuits that have classified nurses in various health care institutions as supervisors would exclude some forty percent of the care-giving staff in such institutions from the Act's protection. *See* Harrington, *et al.*, *Nursing Facilities, Staffing, Residents, and Facility Deficiencies, 1992 Through 1998* 69 (2000).

CONCLUSION

For these reasons and those set forth in the NLRB petition, the petition, for a writ of certiorari should be granted.

Respectfully submitted,

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